

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2057

To be argued by
MARK C. RUTZICK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID HOLLIS,

Petitioner-Appellant,

-against-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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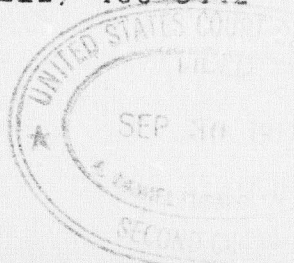


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ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from an order of the United
States District Court for the Eastern District of New York
(Hon. Thomas C. Platt, Jr., U.S.D.J.) dated February 9, 1977

denying the petition for a writ of habeas corpus and from Judge Platt's order dated March 7, 1977 granting petitioner's motion for reconsideration and adhering to the decision of February 9, 1977 denying the petition. Judge Platt's decisions of February 9 and March 7 are both unreported.

Question Presented

1. Was petitioner denied due process of law at his 1969 sex offender sentencing proceeding?

Statement of the Case

The factual and procedural background of this case are largely not in dispute. Respondent-appellee ("respondent") accepts the "Statement of the Case" and "Statement of Facts" set out at pp. 5-9 of the Petitioner's Brief, with two points of exception. Petitioner-appellant ("petitioner") suggests (at p. 9) that the District Attorney conceded in the Appellate Division appeal of petitioner's 1969 sentence that the standard of proof beyond a reasonable doubt was not in fact employed in the sentencing hearing. This is not established

in the record. Rather, the District Attorney's brief (A. 167-68*) makes no direct reference to the standard of proof at all, and asserts inferentially only that the "reasonable doubt" standard was not a legal requirement.

Petitioner also errs in claiming that Judge Platt solicited an affidavit from Judge Kelly, the State trial judge. In fact, Judge Platt sought to contact counsel for both the petitioner and the respondent to request the attorneys to seek such an affidavit. (A. 12). The Attorney General's office subsequently contacted Judge Kelly, who kindly and willingly agreed to provide an affidavit. He forwarded the executed affidavit to the Attorney General's office, which served a copy on the petitioner and filed the affidavit in the District Court (A. 203). The significance of this sequence of events is not apparent to the respondent, but since petitioner has sought to make an issue of Judge Platt's handling of this case below, some reference to those events seems proper.

* Numbers in parentheses enumerated "A.-" refer to the Appendix.

POINT I

THE NEW YORK SEX OFFENDER SENTENCING
PROCEDURE DOES NOT OFFEND CONSTITUTIONAL
STANDARDS OF DUE PROCESS.

A. The unusual evolution of the New York sex offender sentencing procedure.

The New York sex offender sentencing procedure under attack in this case has had an unusual course of development which bears directly on its constitutionality. In 1951, the New York Legislature amended § 243 of the Penal Law, and certain similar sections, to provide that commission of certain crimes, including the crime of assault in the second degree, when done with intent to commit one of a group of enumerated sex crimes, was punishable by an indeterminate prison term of one day to life, as an alternative to the previously prescribed sentence, which for assault in the second degree was up to five years in prison or a one thousand dollar fine or both. L. 1950, c. 525 § 10.*

* This law was passed following the veto by Governor Dewey of a 1947 bill authorizing indefinite confinement of "sexual psychopaths". That bill was vetoed because it "failed to provide adequate safeguards for the civil rights" of affected individuals. N.Y. Legis. Docs. 1950, No. 56, p. 9.

The 1950 amendments followed the recommendations of a special committee appointed by Governor Dewey in 1948 to study sex offenders at Sing Sing Prison and to recommend new legislation to handle the problem of the sentencing of sex offenders. The committee identified two distinct problems in connection with the then-current sentencing laws: those laws failed to give society adequate long-range protection against untreatable, unreformable, dangerous sex offenders (N.Y. Legis Docs. 1950, No. 56 at 25-26) (hereafter "Doc. 56"), and the laws also failed to provide opportunity for psychiatric treatment for those sex offenders who were deemed treatable (Doc. 56 at 29-33). In an attempt to solve both these problems (i.e. to protect society as well as to benefit the sex offender), the committee proposed the indeterminate one day to life sentencing alternative which was subsequently enacted (Doc. 56 at 44). The committee's report left no doubt that it expected its proposed sentencing alternative to be utilized by the trial judge in his discretion at the imposition of sentence following conviction, without participation by a jury (Doc. 56 at 43-45).

The hopeful optimism of the Governor's committee soon proved false, however, and the program for psychiatric

treatment of imprisoned sex offenders was not regarded as successful. At the same time, the utility of the indeterminate sentence in protecting society from dangerous sex offenders was not questioned. See People v. Jackson, 20 A D 2d 170, 173 (Third Dept. 1963).

In 1965 the Legislature enacted a comprehensive new penal code to become effective September 1, 1967. L. 1965, c. 1030. The one day to life indeterminate sentence for sex offenders was omitted. See, e.g., N.Y. Penal Law §§ 120.05, 70.00(2)(d).

On April 10, 1968, more than seven months after the expiration of the sex offender indeterminate sentence law, the New York Court of Appeals decided People v. Bailey, 21 N Y 2d 588. In that case, the Court of Appeals examined the sex offender sentencing procedure in light of the Supreme Court's decision in Specht v. Patterson, 386 U.S. 605 (1967). It held that the applicability of Specht turned on whether the discretion of the sentencing judge to give the indeterminate sentence was limited in any way to cases where an additional finding could be made. Noting that the statute itself suggested absolute

discretion on the part of the sentencing judge, the Court examined the history of the statute and held that Specht did apply because "the discretion of the sentencing Judge to mete out a one-day-to-life sentence is limited to those cases in which the record indicates some basis for a finding that the defendant is a danger to society or is capable of being benefited by the confinement envisaged under the statutory scheme." People v. Bailey, supra, at 594 (emphasis supplied).

This holding is significant in two respects. First, it shows that the factual finding the Court required is not a formal finding to be determined by a precise standard of proof, but rather is only an informal threshold finding to be made by the judge in the process of sentencing, which need have only "some basis" on the record. The judge can even impose the sentence despite psychiatric reports recommending to the contrary, as long as "there is other evidence in the record to sustain a finding that the sentence conforms to the purpose of the offender statute." Ibid. See People v. Rhodes, 15 N Y 2d 729 (1965).

Secondly, the Court of Appeals confirmed that the indeterminate sentence could be imposed for either of two

distinct reasons: (1) because the convict is a danger to society or (2) because the convict may benefit from either treatment or other aspects of his confinement. Thus the Court of Appeals confirmed that the purpose of the indeterminate sentencing law was as contemplated by the Governor's committee in 1950 -- either to protect society or to help the convicted offender, or both. The mere fact that the convicted offender was a danger to society was enough to justify the sentence, irrespective of the possibility of the offender responding to treatment during confinement. People v. Bailey, supra.

Though the Court of Appeals held that Specht v. Patterson applied to the New York sex offender sentencing proceeding, one critical difference must be noted between New York's procedure and the Colorado procedure weighed in Specht. In Specht the Supreme Court observed that in Colorado, the Sex Offenders Act "makes one conviction the basis for commencing another proceeding under another Act." Specht, supra, 386 U.S. at 608 (emphasis supplied). In New York, by contrast, the indeterminate sentence was authorized by the very statute prescribing punishment for the underlying crime, see, e.g., former N.Y. Penal Law § 243, and was automatically a

sentencing alternative in every case. Unlike Colorado law, former Penal Law § 2189-a required a psychiatric report automatically following conviction of any crime carrying the indeterminate sentence alternative. See People v. Spry, 5 A D 2d 835 (Second Dept. 1958). No separate proceeding was required to impose the indeterminate sentence; it was simply done at sentencing. It was only when the Court of Appeals decided People v. Bailey, supra, that any separate proceeding at all became required.

Thus it becomes clear that the Court of Appeals decision in People v. Bailey was in fact an extension of Specht v. Patterson, and was not actually dictated by the latter decision. The Bailey hearing which petitioner challenges here is authorized only by New York law, and has never been held by any federal court to be required by the Constitution. Thus the requirements of due process at a Bailey hearing are not necessarily as broad as those at a Specht hearing, and even were petitioner to show that his Bailey hearing was deficient under the principles of Specht, an independent analysis of due process requirements at a Bailey hearing would still be required.

In People v. Bailey the Court of Appeals applied its decision retroactively and authorized a hearing to be held for every person then serving an indeterminate sentence. 21 N Y 2d at 597. Since the indeterminate sentence law was no longer in effect, the retroactive application was in essence the only application. Petitioner was among those seeking a Bailey hearing, and he received such a hearing commencing January 21, 1969. It is this hearing which petitioner now challenges. Following this hearing he was sentenced nunc pro tunc to the indeterminate sentence, a procedure this Court has previously approved. United States ex rel. Hayden v. Zelker, 506 F. 2d 1228 (2d Cir. 1974).

Petitioner thus is in a peculiar position. He enjoyed no right to a hearing at all until the Court of Appeals decided People v. Bailey, and following that decision he received exactly the hearing prescribed in Bailey, which followed the Supreme Court's formulation in Specht. Now he is seeking another hearing on the theory that although the Court of Appeals granted him the hearing, that Court is powerless to control the nature and form of the hearing. Petitioner asks the federal courts to override the decision

of the Court of Appeals and to impose on the Bailey hearing a series of procedures neither contemplated nor desired by the Court of Appeals in Bailey or subsequent thereto (see People v. McCraw, 27 N Y 2d 652 (1970), aff'g 33 A D 2d 577 (Second Dept. 1969)).

Indeed, it must be asked if the Court of Appeals would have required a hearing at all if it had known that at such a hearing the defendant could take the sentencing decision from the judge altogether by requesting a jury bound by the reasonable doubt standard, and that the defendant could refuse altogether to permit psychiatric examination by invoking his right to remain silent and to have his attorney present at the examination. Use of these procedures would so alter the sentencing procedure as to render it unrecognizable and wholly beyond the intention of the New York Legislature which enacted the indeterminate sentencing laws. Yet these are the procedures petitioner asks this Court to impose upon New York.

It must also be stressed that petitioner is not in this petition challenging the quality of psychiatric or rehabilitative treatment he is in fact receiving in prison. He concedes that he has available state remedies through which

he can press such claims. Petitioner's Brief at 7. Though petitioner makes repeated references to an alleged absence of psychiatric care in his current incarceration, such allegations may not enter into this Court's consideration of this appeal for three reasons: (1) petitioner has not shown that he is entitled to such care under New York law, (2) if he were entitled to such treatment, his failure to receive it is not a claim cognizable in habeas corpus, Fielding v. LeFevre, 548 F. 2d 1102, 1108 (2d Cir. 1977), and (3) if he is not entitled to receive it, New York's preference for punishment and deterrence over rehabilitation is not reviewable by the federal courts. Ibid. Nor is petitioner challenging New York's procedures on equal protection grounds.

Certainly, New York has the right to impose a life sentence upon petitioner after conviction of a serious crime, and subject to a claim of cruel and unusual punishment (not present here), that sentence is beyond the review of the federal courts. Ibid; see Gregg v. Georgia, 428 U S 153, 175 76 (1976) (Opinion of Stewart, Powell and Stevens, JJ.), 225-26 (Opinion of White, J., joined by Burger, C. J. and Rehnquist, J.).

B. Petitioner's Interpretation of Specht v. Patterson.

Petitioner's due process attack upon the New York sex offender sentencing procedure is premised upon a simply stated proposition: that he was entitled in that procedure to every constitutional right which is guaranteed to a defendant in a criminal trial. Petitioner's Brief at 15. Petitioner purports to find inferential support for this sweeping proposal in the Supreme Court's approving quotation in Specht v. Patterson, supra, of a portion of the decision of the United States Court of Appeals for the Third Circuit in United States ex rel. Gerchman v. Maroney, 355 F. 2d 302 (1966). Specht, supra at 609-10. Yet far more significant than inferences from Court of Appeals decisions are the explicit words of the Supreme Court in delineating the due process rights required at sex offender sentencing hearings. The Court said:

"Due process, in other words, requires that he [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." Specht v. Patterson, 386 U.S. at 610.

Petitioner maintains that despite the appearance of this specific list of due process requirements, the Supreme Court meant to include many additional protections which it omitted from the list. Petitioner contends that Justice Douglas meant his list of protections to be "illustrative" rather than, as would appear from its face, the holding of the case.

Petitioner does not explain, however, why the Court in Specht compared the sex offender sentencing proceeding to two kinds of proceedings where some but not all due process protections had been required ("habitual criminal" hearings, Oyler v. Boles, 368 U.S. 448, 452 [1962], and "psychopathic personality" hearings, Minnesota v. Probate Court, 309 U.S. 270 [1940]), and did not in any way compare it to a regular criminal trial. It seems clear, then, that petitioner's position is untenable, and the words of the Supreme Court are to be given their normal meaning: due process requires only those protections set forth in Specht.

C. Petitioner had no right to remain silent or to have counsel present at his psychiatric examination.

The easiest demonstration of the fallacy of petitioner's contention that Specht requires all criminal due process rights

at a sex offender sentencing proceeding lies in an analysis of his claim that he had a right to remain silent at his psychiatric examination and to have counsel present with him at the examination. Fifth Amendment and Sixth Amendment rights had been incorporated in the Fourteenth Amendment's guarantee of liberty, see Malloy v. Hogan, 378 U.S. 1 (1964), well before Specht, and are certainly among the most basic due process rights of criminal defendants. Yet the application of these rights to the pre-sentence psychiatric examination was not enumerated in Specht as among those rights required in the sex offender sentencing proceeding. It is farfetched beyond all pausibility that this omission was inadvertent or that those rights were meant simply to be inferred from the language of the opinion.

Nor is it persuasive to contend, as petitioner does, that these rights were not mentioned in Specht because those issues "weren't raised" there. It does not appear, for instance, that the petitioner in Specht "raised" the issue of a right to counsel at the hearing itself (see Specht at 608), yet the Supreme Court included that right in its list of applicable rights. Neither did the petitioner "raise" an

issue concerning the nature of findings to be made at the hearing (since no hearing had been held). Yet the Court did not omit to include adequate findings among the rights it applied to the sex offender hearing. The only explanation for the Court's failure to list the right to remain silent and to be counseled at the psychiatric examination as among the guaranteed rights is simply that it did not intend those rights to exist.*

The reasons for this exclusion are apparent and have been noted by several courts. The psychiatric evaluation process which underlies the sex offender sentencing proceeding in most states including New York would simply cease to function if the already-convicted offender refused to speak at the examination. Psychiatry is, after all, an almost-exclusively verbal science. Valid psychiatric conclusions cannot in most cases be drawn without verbal interaction between patient and doctor. "The absolute indispensability of a personal examination of one as to whom a mental appraisal is to be made seems

* The Supreme Court's extension of the right to counsel to juvenile delinquency hearings in In Re Gault, 387 U.S. 1 (1967) makes its omission of that right at the sex offender psychiatric examination even more glaring.

inconceivable. . . .[T]he purpose of the stage of the . . . proceeding that is being attacked herein is not to determine or to gain evidence to prove that the subject has committed a crime, but rather to discover the inmate's mental and emotional condition." Sas v. State of Maryland, 295 F. Supp. 389, 411 (D. Md. 1969), aff'd sub nom Tippet v. State of Maryland, 436 F. 2d 1153 (4th Cir. 1971) cert. dismissed sub nom Murel v. Baltimore City Court, 407 U.S. 355 (1972), quoted in Dower v. Director, Patuxent, 396 F. Supp. 1070, 1076-77 (D. Md. 1975), aff'd sub nom Dower v. Baslow, 539 F. 2d 969 (4th Cir. 1976). To permit the offender to stymie the examination by invoking his right to silence would defeat society's unquestioned right to protect itself through the imposition of necessary and appropriate sentences for sex offenders. See Gomes v. Gaughan, 471 F. 2d 794, 799 (1 Cir. 1973).

The right to counsel at the psychiatric examination also cannot be tolerated for similar reasons. "It is difficult to imagine anything more stultifying to a psychiatrist, as dependent as he is upon the cooperation of his patient, than the presence of a lawyer objecting to the psychiatrist's questions and advising his client not to answer this question and that." Tippet v. State of Maryland, supra, at 1158, quoted

in Dower v. Director, Patuxent, supra, at 1077; see Gomes v. Gaughan, supra at 799; French v. Blackburn, 428 F. Supp. 1351, 1359 (M.D.N.C. 1977); Hawks v. Lazaro, W. Va., 202 S.E. 2d 109, 126 (1974).

It seems apparent that the Supreme Court in Specht v. Patterson, supra, had no intention to eliminate or stultify sex offender sentencing proceedings. On the contrary, its application of due process to those proceedings seemed intended to strengthen and invigorate them. The Court's approving comparison to Minnesota v. Probate Court, 309 U.S. 270 (1940), involving a proceeding based on uncounseled and unfettered psychiatric examinations of the subject (Id. at 275-76), shows its underlying support for these proceedings. The Supreme Court could not have intended the right of silence and right to counsel to apply to sex offender psychiatric examinations. Also see Baxter v. Palmigiano, 425 U.S. 308 (1976); Middendorf v. Henry, 425 U.S. 25 (1976). Judge Platt's decision is fully in accord with this position. (A. 7-8).

No courts have held these rights to apply to sex offender sentencing proceedings. The cases cited by

petitioner at pp. 36-37 of his Brief do not so hold. The Supreme Court in McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) did not address the subject at Fifth or Sixth Amendment rights at all; it decided the case on a different ground (Id. at 248). Justice Douglas, in a lone concurrence, did opine that the Fifth Amendment right to silence applied to Maryland's defective delinquent examination. Id. at 256-57. The fact that Justice Douglas, the author of Specht, expressed this view in a concurring dictum in McNeil only reinforces the conclusion that the Court, as opposed to Justice Douglas himself, did not wish to extend the privilege to psychiatric examinations in post-conviction proceedings.

The two Illinois cases cited by petitioner, People v. English, 201 N.E. 2d 455 (1964) and People v. Potter, 228 N.E. 2d 238 (1967) both actually support respondent's position. In English, the Illinois Supreme Court held that the Fifth Amendment did not apply to "a psychiatric examination to determine [an individual's] status as a sexually dangerous person." People v. English, supra, 201 N.E. 2d at 458. In Illinois, unlike New York, conviction is not a predicate to the sex offender proceeding, and the English court held

only that the defendant could not be compelled to answer questions at the psychiatric examination which might incriminate him of a crime. Since Mr. Hollis, the petitioner herein, had already been convicted (after a guilty plea) and faced no further criminal liability, the rationale of English would deny him both Fifth and Sixth Amendment rights at his psychiatric examination. Accord: People v. Potter, supra, Ill., 228 N.E. 2d 238, 240 (1967).

Seigny v. Burns, N.H., 227 A. 2d 775 (1967) is also to like effect. In that case the defendant still faced potential criminal liability for the acts in question in his "sexual psychopath" hearing, Id. at 776, and the Fifth Amendment privilege was held to protect him from self-incrimination as to the potential criminal acts, and not as to any inquiry into his status as a sexual psychopath. Id. at 777. This theory would offer no protection to Mr. Hollis.

Petitioner mischaracterizes the role of the examining psychiatrists in this case in describing them as "agents of the State." The two doctors had no stake in seeking one sentence as opposed to another for this particular

defendant. Rather, their ethical and legal obligation was to report their medical findings to the Court as faithfully as possible, and to assist the Court in reaching a sentencing decision fair to both society and the convicted offender. Nor can petitioner disparage the function of the psychiatrists by attacking the conditions of the confinement to which petitioner was actually sentenced. As discussed above, ante at 12, this Court is not in a position to evaluate either the treatment that petitioner is receiving or that to which he is entitled under either state or federal law. Since petitioner has withdrawn those claims in his petition, he may not undo that withdrawal (which was dictated by the requirements of the exhaustion doctrine) by making unsupported conclusory allegations in his brief. To whatever extent petitioner's actual conditions of confinement bear on his claims herein, this Court cannot make those determinations.

D. Petitioner had no right to a jury trial at his sentencing hearing.

Having demonstrated that the Supreme Court in Specht v. Patterson, supra, must have intended to deny convicted offenders the right to silence and right to counsel at the

pre-hearing psychiatric examination, it becomes clear that petitioner's basic analytic proposition -- that convicted offenders are entitled to all the rights at a sex offender sentencing hearing as criminal defendants are at trial -- is simply incorrect. This conclusion puts in far different -- and weaker -- light petitioner's asserted right to a jury trial at his hearing.

The fact that the Supreme Court had not yet incorporated the jury right into the Fourteenth Amendment at the time of Specht, see Duncan v. Louisiana, 391 U.S. 145 (1968), does nothing to establish that the Supreme Court ever contemplated that the jury right should be among the rights applied at the sex offender sentencing hearing, thereby denying the hearing judge the right to make the sentencing decision which is the subject of the hearing. All indications are to the contrary.

The Court in Specht enumerated among the due process requirements the following: "there must be findings adequate to make meaningful any appeal that is allowed." Specht, supra, at 610. This specific requirement of "findings" imposes a burden on the fact finder which has never in any known case

been imposed on a jury as a matter of constitutional law. It has never been thought necessary to impose constraints on the fact-finding process of the jury in a criminal case, because the findings of guilt or innocence of a jury are simply not reviewable by appellate courts. So for the Supreme Court to require "findings" which are to be reviewable on appeal can only mean that those findings are to be made by a judge, at least in cases where state law commits that fact-finding power to the judge.

It is only the judge who can write a decision clearly stating the reasons for his sentence, as Judge Kelly did in this case. While it might be possible to construct a system of special interrogatories or questionnaires or a consensus oral opinion by a jury, (see Sas v. Maryland, supra, at 405-06 n. 12) this is clearly a most novel undertaking and one not at all assured of success.

At the same time of course, nothing would prevent a State from adopting a jury trial option for sex offender proceedings, and some states have followed this option by statute (e.g., Ill. Ann. Stat. ch. 38, § 105-5 [1972]) or by

constitutional amendment (e.g., California Constitution, Art. I, § 16; see People v. Feagley, 535 P. 2d 373 [1975]).* While the method of findings might differ from state to state, since the right to jury trial would exist only at the option of the defendant, no constitutional question would be raised upon his election of that right (and petitioner's suggestion to the contrary [Brief at p. 32] is baseless).

New York chose to permit the judge to make the findings and the sentencing decision at sex offender sentencing hearings. Indeed, in New York the sex offender sentencing proceeding is more integrally tied into the fundamental discretionary sentencing decision of the trial judge than in Colorado or any of the other states whose decisions are cited by petitioner. See People v. Bailey, supra, 21 N Y 2d 588; People v. Rhodes, supra, 15 N Y 2d 729. In light of the care with which the New York Court of Appeals applied Specht to its procedure, no reason has been shown why the decision of the New York Legislature, as upheld by the Court of Appeals, to give the sentencing judge the decision-making power should be overturned.

* In Humphrey v. Cady, 405 U.S. 504 (1972) the Court did no more than compare Wisconsin's civil commitment proceeding with its sex offender proceeding and direct the District Court to consider if granting a jury trial in the former but not in the latter might be an equal protection violation. No due process issue was raised.

The cases cited by petitioner fail to support his position. People v. Feagley, supra, 535 P. 2d 373, is inapposite because as noted above the California Constitution guaranteed the right to jury trial, and the California Supreme Court interpreted that right to apply to sex offender hearings. Id. at 380. As an alternative ground the Court relied on California and federal equal protection grounds. Id. at 381-82. Due process did not enter the decision. (Mr. Hollis, it should be stressed, is not raising any equal protection argument in this case.) Similarly in Quesnell v. State, Wash., 517 P. 2d 568 (1974), the Washington Constitution guaranteed a jury trial in mental illness proceedings, and federal due process law was never raised. In Commonwealth v. Page, Mass., 159 N.E. 2d 82 (1959), the decision requiring a jury trial in a sexually dangerous person proceeding appears based on state law, and the federal constitution or its due process clause are never mentioned. Id. at 86. Thus petitioner cites to no cases holding that the due process clause of the federal Constitution gives convicted offenders the right to a jury trial at a sex offender sentencing proceeding.

Some other courts, on the other hand, have held that due process does not require a jury trial in sex

offender or civil commitment proceedings. See Buchanan v. State, Wis., 164 N.W. 2d 253 (1969) (jury trial in sex offender proceeding not required under due process), overruled on other grounds, State ex rel. Farrell v. Stovall, 207 N.W. 2d 809 (1973) (jury trial required under equal protection); Doremus v. Farrell, 407 F. Supp. 509, 516 (D. Neb. 1975) (three-judge court) (jury trial not required in civil commitment proceeding); Bartley v. Kremens, 402 F. Supp. 1039, 1051 (E.D. Pa. 1975) (three-judge court), vacated on other grounds, ____ U.S. ____, 52 L. Ed. 2d 184 (1977) (same as to juveniles).

Indeed, the Supreme Court has held that jury trials are not constitutionally mandated in juvenile proceedings, McKeiver v. Pennsylvania, 403 U.S. 528 (1971), even though In Re Gault, supra, applies due process to those proceedings. Certainly McKeiver shows that the right to jury trial does not automatically attend the imposition of due process protections.

In any event, in the circumstances of petitioner's sentence sound policy reasons dictate against this Court retroactively applying a right to jury trial. The New York

sex offender sentence has been interred for over ten years, and the only effect such a ruling could have is retroactive. Yet the Supreme Court declined to make its decision in Duncan v. Louisiana, supra, retroactive, see DeStefano v. Woods, 392 U.S. 621, 635 (1968), on the ground that the Court could not say that any particular individual had received unfair treatment at trial before a judge rather than jury. Id at 634. The same argument applies with force here. Since it cannot be shown that petitioner did fare worse before Judge Kelly than he would have before a jury, and since there are no more such hearings to be held in the future, retroactive enforcement of a right to jury trial would be unnecessary and inappropriate.

Petitioner currently enjoys at least the same opportunity for parole as any other prisoner. Indeed, he was paroled in 1972 but returned to prison following commission of another offense in 1973. Since his indeterminate sentence was a proper sentence under New York law for the crime he committed, and since he received the sentence because of Judge Kelly's finding that he was a "danger to society" -- a proper finding in support of any life sentence -- petitioner is in

no worse a position, and has received no less fair treatment, than any other life-sentence prisoner. He has no equitable claim to receive a new sentencing hearing. His path to freedom lies through the parole board.

E. Petitioner did receive the benefit of the "beyond a reasonable doubt" standard, which was not in any event constitutionally mandated.

1. Petitioner did receive the benefit of the "beyond a reasonable doubt" standard.

Petitioner has expressed considerable displeasure with the manner in which the District Judge handled this case. Apparently petitioner believes there are some facts which a District Court may not have, even though it believes them of the utmost relevance. Petitioner must also believe that the obligation of a District Court to adjudge the constitutionality of a confinement is bounded by the four corners of the legal papers filed by the parties. Petitioner is wrong in both respects, and the actions of the District Judge were perfectly proper.

Petitioner's ire is aroused by the affidavit submitted to the District Court by Judge Paul Kelly (now a Supreme Court Justice), who as a County Court Judge in 1969 gave petitioner his one day to life indeterminate sentence. The affidavit

states a simple fact: Judge Kelly did in fact apply the standard of proof beyond a reasonable doubt in making the findings in support of the sentence he gave petitioner. Since this is the standard petitioner claims he was entitled to, Judge Kelly's affidavit puts that claim to rest.

Petitioner, however, not only doesn't believe Judge Kelly, but attacks the District Judge for inquiring into that matter, and at the same time wants to deprive the District Judge of the right to consider the affidavit altogether.

Judge Platt's actions are beyond reproach. The simple fact is that both parties in this proceeding did assume that Judge Kelly had not applied the "beyond a reasonable doubt" standard. Yet actually there is nothing in the hearing record (A. 37-141) to indicate the standard Judge Kelly applied, since, as petitioner concedes, he never raised the issue of the appropriate standard of proof at the hearing. (Brief p. 36). Both parties may have relied on the appellate briefs and decisions in deducing Judge Kelly's standard of proof. Whatever the reason, petitioner offered no record support for the assertion that Judge Kelly denied him the standard he wished (but did not request) at the hearing. Respondent also did not address that point.

Judge Platt did perceive that absence of proof, and contacted both sides in search of an affidavit from Judge Kelly. Certainly Judge Platt did not know what Judge Kelly would state in the affidavit; neither did the Attorney General's office, which duly contacted Judge Kelly to relay Judge Platt's request for an affidavit.* Upon receipt, the affidavit was filed in court like any evidence, with a copy forwarded to petitioner. The affidavit justified Judge Platt's inquiry, for it showed that the parties had in fact erred in their conclusion as to the standard of proof employed.

There is nothing unseemly or improper in Judge Platt's consideration of the affidavit. First, the State is not adopting a position contrary to any position it ever took in the State courts: as far as the available papers show, neither party in the State courts ever expressed a view as to what standard Judge Kelly actually applied, and the District Attorney

* Judge Platt was not requesting Judge Kelly to determine the constitutionality of the standard of proof he applied, and Judge Kelly made no such legal conclusion. He simply stated the standard of proof which he actually used, and left to Judge Platt the legal significance of that standard. Contrary to petitioner's suggestion, there is nothing improper in this procedure. Cf. Fielding v. LeFevre, supra, 548 F. 2d 1102.

argued, as does the Attorney General here, that the required standard was less than "beyond a reasonable doubt." There is no inconsistency. Cf. Application of Martuzas, 400 F. Supp. 1305 (W.D.N.Y. 1975). Secondly, this is not a case where the relevant facts were not in dispute between the parties. Rather, it is a case where the relevant facts were unknown to the parties, who mistakenly believed them inferrable from the law. It is hard for a habeas corpus petitioner to object to the federal District Judge inquiring as to the true facts of his confinement. Such an objection quite starkly misperceives the nature of the proceeding.

Petitioner also doubts the veracity of the Kelly affidavit, based on his understanding of New York law. Yet petitioner's own review of the law establishes the plausibility and propriety of Judge Kelly's adoption of the "beyond a reasonable doubt" standard in sex offender hearings. Respondent agrees that under New York law the sentencing decision at sex offender hearings was one in which the sentencing judge had considerable discretion. That discretion, however, also extended to the standard of proof by which a judge would make that decision. Perhaps some judges might employ the "some basis"

standard of People v. Bailey, supra, but that was only a minimum standard, and a sentencing judge clearly could, in his discretion, apply a higher standard. Some might apply a preponderance of the evidence standard, while others could choose to require proof beyond a reasonable doubt. Judge Kelly was one of the latter group, and no survey of New York cases can possibly show that he applied any standard other than that. Petitioner did have one chance to ascertain Judge Kelly's standard of proof on the record -- at the sentencing hearing. However, he waived that right.

Thus, petitioner has not in fact come forth with any proof, of a legal or factual nature, to cast doubt on Judge Kelly's affidavit. There is no basis for a conclusion by this Court that Judge Platt's findings of fact in this regard are "clearly erroneous", and therefore they must be respected. United States v. General Dynamics Corp., 415 U.S. 486, 508 (1974); Fed. Rules Civ. Pro. Rule 52(a).

2. Petitioner was not entitled to the standard of proof beyond a reasonable doubt.

Petitioner contends that In Re Winship, 397 U.S. 358 (1970) requires that findings at sex offender sentencing

proceedings be made by the "beyond a reasonable doubt" standard. Winship held that in any proceeding which could result in conviction of an offense and loss of liberty, proof of the elements of the offense must be by the "reasonable doubt" standard. Id. at 366. Yet, very simply, New York's sex offender sentencing proceeding is not the kind of proceeding contemplated in Winship, because that proceeding does not result in a loss of liberty. In New York, liberty has already been lost, through criminal conviction, before the sex offender sentencing proceeding takes place. Further, it must be stressed that in New York the sex offender proceeding is fundamentally a sentencing proceeding -- a part of the sentencing process which follows criminal conviction. It is not in any sense a commitment proceeding.

The New York procedure thus differs greatly from those challenged in other states where the reasonable doubt standard has been held to apply. In Illinois, see United States ex rel. Stachulak v. Coughlin, 520 F. 2d 931 (7th Cir. 1975), cert. denied 424 U.S. 947 (1976); People v. Pembrock, Ill., 342 N.E. 2d 28 (1976), the sex offender proceeding is in lieu of criminal prosecution and no prior criminal conviction

has occurred. In California, see People v. Burnick, Cal., 535 P. 2d 352 (1975) the sex offender proceeding is conducted in a different court than the trial court, is expressly in lieu of criminal sentencing, and results in confinement not in prison but in a secure institution. In Massachusetts, see In Re Andrews, Mass., 334 N.E. 2d 15 (1975), the sex offender proceeding occurs after the offender has already been sentenced and is serving his prison term, and involves a transfer from prison to a secure mental hospital. None of the above-cited cases indicate that the Constitution requires proof beyond a reasonable doubt of the findings to support a sentence imposed following conviction of a criminal offense where that standard was properly applied.

Thus New York's sex offender sentencing procedure is in some respects a unique hybrid -- an ordinary discretionary sentencing proceeding overlaid with some state-imposed due process procedures. Yet, as the Court of Appeals indicated in People v. Bailey, supra, the discretion of the sentencing judge remains wide, and he may impose the indeterminate sentence if he finds "some basis" for the findings required. Since New York law could have permitted the indeterminate sentence with no findings or due process procedures whatever, see

Williams v. New York, 337 U.S. 241 (1949), New York's decision to limit the discretion of the sentencing judge by requiring findings supported by "some basis" in the record should not automatically trigger the imposition of the "reasonable doubt" standard of proof, which would in effect overrule New York's legislative preference, and penalize New York for trying to limit those upon whom the indeterminate sentence can be imposed.

Even in some situations where no prior criminal conviction has occurred, such as in civil commitments, the reasonable doubt standard has been held not required by the Constitution. French v. Blackburn, supra, 428 F. Supp. 1351, 1360 (three-judge court); Stamus v. Leonhardt, 414 F. Supp. 439, 449 (S.D. Iowa, 1976); Doremus v. Farrell, supra, 407 F. Supp. at 516-517; Bartley v. Kremens, supra, 402 F. Supp. 1039, 1052-53; State ex rel. Farrell v. Stovall, Wis., 207 N.W. 2d 809, 819 (1973). Due process is flexible, and must be determined upon consideration of the circumstances of each particular situation. Mathews v. Eldridge, 424 U.S. 319 (1976); Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961). The Supreme Court has not always applied the standard of proof

beyond a reasonable doubt even where liberty is at stake.

Woodby v. Immigration Service, 385 U.S. 276 (1966) (deportation proceedings); Chaunt v. United States, 364 U.S. 350 (1960) (revocation of naturalization); Nishikawa v. Dulles, 356 U.S. 129 (1958) (expatriation).

Since petitioner had already lost his liberty prior to the sex offender hearing (by reason of his conviction), all that was at stake at that proceeding was the length of his sentence. This, of course, was of great concern to the petitioner, but it did not determine the loss of liberty itself. See Williams v. New York, supra, 337 U.S. 241. Only the loss of liberty itself can require the reasonable doubt standard, so that standard cannot be constitutionally mandated in a New York sex offender sentencing hearing. The standard of proof established by New York law for that proceeding is constitutionally adequate, and in this case, as discussed above, petitioner did in fact receive the benefit of the very standard which he purports to seek in this proceeding.*

* Next page.

* Judge Platt also rightly concluded that the discovery that Judge Kelly had in fact applied the beyond a reasonable doubt standard at petitioner's hearing constituted a new circumstance which must be presented to the state court. Anderson v. Casscles, 531 F. 2d 682 (2d Cir. 1976); United States ex rel. Cleveland v. Casscles, 479 F. 2d 15 (2d Cir. 1973). The new claim is as follows: since Judge Kelly in his discretion adopted the beyond a reasonable doubt standard, was petitioner entitled to have the Appellate Division review the evidence by the standard adopted by Judge Kelly? The appropriate remedy is a motion for reargument in the Appellate Division. Petitioner's uncertainty as to the availability of relief in the state courts does not excuse him from making the effort. "Even if there were some doubt as to the availability of relief in the New York Courts, we would still give its courts the first chance to review their alleged errors so long as they have not authoritatively shown that no further relief is available." United States ex rel. Bagley v. LaVallee, 332 F. 2d 890, 892 (2d Cir. 1964); United States ex rel. McGrath v. LaVallee, 348 F. 2d 373 (2d Cir. 1965), cert. den. sub nom McGrath v. McCann, 383 U.S. 952, reh. den. 384 U.S. 923 (1966).

CONCLUSION

THE DECISION OF THE DISTRICT COURT
DENYING THE PETITION SHOULD BE
AFFIRMED.

Dated: New York, New York
September 30, 1977

Respectfully submitted,

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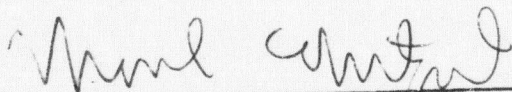
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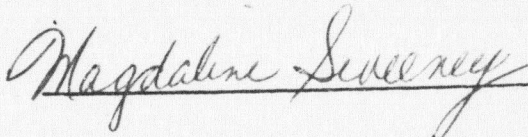
MAGDALINE SWEENEY , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellee
herein. On the 30th day of September, 1977, she served
the annexed upon the following named person :

MATTHEW MURASKIN
Acting Attorney in Charge
Attorney for Petitioner-Appellant
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York 11501

Attorney in the within entitled appeal by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
30th day of September, 1977


Assistant Attorney General
of the State of New York


Magdaline Sweeney